Oct 20 1877
Motion to Dismiss
submitted
and Brief
Dec 10 6 Oct 1877
Oct. 2. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 155.

JOHN D. T. McALLISTER, PLAINTIFF IN ERROR,

vs.

BETRAND KUHN.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES FOR THE TERRITORY OF UTAH.

FILED OCTOBER 5, 1875.

Dec 15 1877
Affirmed
Chief Justice

SUPREME COURT OF THE UNITED STATES.

No. 155.

JOHN D. T. McALLISTER, PLAINTIFF IN ERROR,

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a [SEAL.] UNITED STATES OF AMERICA:

Supreme court.

JOHN D. T. MCALLISTER, PL'FF IN ERROR,
vs.
BERTRAND KUHN, DEF'T IN ERROR.

Record in the court below.

Fees, $15.00 paid.

1 UNITED STATES OF AMERICA,
Territory of Utah:

Supreme court.

Be it remembered that on the 13th day of January, 1875, came John D. T. McAllister, by his attorneys, I. G. Sutherland & Z. Snow, and filed in the clerk's office of this court a duly certified copy of the record and proceedings in the district court of the 3d judicial district of the Territory of Utah, in a case wherein Bertrand Kuhn was plaintiff and the said McAllister was defendant, which said transcript is in the words and figures following:

2 In the district court of the third judicial district of the Territory of Utah, county of Salt Lake.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. MCALLISTER, DEFEN'T.

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges:

That the said plaintiff was on the first day of September, 1873, since then has been, and is now, the owner and lawfully entitled to the pos'ession of the following-described personal property, to wit: Two hundred and fifty (250) shares unassessable of the paid-up capital stock of the North Star Silver Mining Company, limited, an incorporation incorporated under the laws of the Dominion of Canada, and were contained in and represented by five certificates, each certificate being for fifty shares of said capital stock, and each certificate being duly signed on the face thereof by the secretary, treasurer, and president of said company.

That the said two hundred and fifty shares of the capital stock of the said The North Star Silver Mining Company, limited, were at the times above mentioned and are now worth and of the value of twelve thousand dollars.

3 That on or about the first day of September, 1873, and while the plaintiff was the owner and lawfully entitled to the pos'ession of the aforesaid two hundred and fifty shares of capital stock above described, the said defendant at the city of Salt Lake, Territory of Utah, without the plaintiff's consent and wrongfully took the said two hundred & fifty shares described as aforesaid, and converted the same unlawfully and wrongfully to his own use, to the damage of the plaintiff in the sum of twenty-five thousand dollars, ($25,000.)

That before the commencement of this action, to wit, on the 6th day of September, 1873, the plaintiff demanded of the defendant pos'ession

of the said two hundred and fifty shares of capital stock aforementioned and described, but that the defendant refused to return the same, still retains pos'session thereof from the plaintiff.

Wherefore plaintiff demands judgement against the defendant for the sum of twenty-five thousand dollars and his costs of action.

SMITH & TILFORD,
Att'ys for Pl'ff.

TERRITORY OF UTAH,
County of Salt Lake:

Bertrand Kuhn, being duly sworn, says that he is the plaintiff
4 in the above-entitled , and has heard read the foregoing complaint, and that the same is true of his own knowledge except as to the matters stated therein on information and belief, and that as to those matters he believes it to be true.

BERTRAND KUHN.

Subscribed and sworn to before me this 9th day of September, 1873.
JOS. F. NOUNNAN, *Clerk.*

(Indorsed:) Third district court. Bertrand Kuhn vs. J. D. T. McAllister. Filed Sept. 9, 1873. Jos. F. Nounnan, clerk. Issued Sept. 9, 1873.

In the district court in and for the third judicial district, Territory of Utah.

COUNTY OF SALT LAKE:

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. MCALLISTER, DEFENDANT.

The Territory of Utah send greeting to John D. T. McAllister, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the third judicial district of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover the sum of $25,000.00, damages alleged to have been sustained by plaintiff from the unlawful and wrongful detention of 250 shares of the capital stock of the "North Star Silver Mining Company," (limited,) by defendant from plaintiff, together with costs of suit, all of which appears more fully set out in the complaint on file herein.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgement against you for said sum of $25,000$ damages, and for costs of suit aforesaid.

Witness the Hon. Ja's B. McKean judge, and the seal of the district court of the third judicial district, in and for the Territory of Utah, this 9th day of September, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.]

JOS. F. NOUNNAN, *Clerk,*
By
Deputy Clerk.

6 TERRITORY OF UTAH,
Salt Lake County, ss:

I do hereby certify that I did on the 10th day of September, A. D. 1873, in the city & county of Salt Lake, serve this summons, together with a certified copy of the complaint attached, on the within-named defendant John D. T. McAllister, by delivering the same to him in person.

R. F. BUSTOW, *Sheriff*,
By A. DEWEY, *Deputy*.

(Indorsed:) No. 961. Original. District court third judicial district. County of Salt Lake. Bertrand Kuhn, plaintiff, against John D. T. McAllister, defendant. Summons. Smith & Tilford, plaintiff's attorney'. Filed on return Sept. 22d, 1873. Jos. F. Nounnan, clerk, by , deputy clerk.

7 In the district court of the third judicial district of the Territory of Utah.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. MCALLISTEB, DEFENDANT. } Demurrer to complaint.

And now comes the said defendant and demurs to said complaint, and for causes of demurrer assigns the following, to wit:

First. That said complaint does not state facts sufficient to constitute a cause of action.

Second. That said complaint is ambiguous and uncertain in this, that said complaint does not describe the said property alleged to have been taken and converted so that the same can be identified.

That it doth not appear by said complaint to whom said certificates of stock were issued or to whom payable, whether they are owned by the payee therein or his assignee. The numbers of said certificates are not given, nor is it stated that said 5 certificates were all the certificates issued. The value of each of said five certificates is not given. The terms and conditions of said certificates are not given in substance
7½ or in fact.

MARSHALL & ROYLE,
Attorneys for Defendant.

(Indorsed:) District court, 3d district. Bertrand Kuhn vs. John D. T. McAllister, demurrer to complaint. Copy of the within served on us this day the 18th day of Sept., 1873. Smith & Tilford, att'ys for plaintiff. Filed Sept. 18, 1873. Jos. F. Nounnan, clerk. Marshall & Royle, attorneys for def't.

8 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake on the 15th day of April, A. D. 1874.

Present, the Hon. Ja's B. McKean, judge of the third judicial district.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. MCALLISTER, DEFENDANT.

Now comes the defendant, and by leave of court first had and obtained, withdraws his demurrer herein, and has ten days from the date hereof granted him by the court in which to file his answer.

I, Edw'd B. McKean, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court, this thirteenth day of January, A. D. 1875.

[SEAL.] EDW'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE, *Dep'y Clerk.*

9 In the district court of the third judicial district of Utah Territory, Salt Lake County.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. McALLISTER, DEFENDANT.

In this action the said defendant, John D. T. McAllister, having duly appeared and filed his demurrer to the complaint herein, and the same having been by leave withdrawn in open court on the 15th day of April, 1874, and defendant was given 10 days within which to file answer herein:

And said defendant having failed to answer the plaintiff's complaint, and the time allowed by the court for answering herein having fully expired, the default of said defendant is hereby entered according to law.

Attest my hand and the seal of said court this 28th day of April, 1874.

[SEAL.] JOS. F. NOUNNAN,
Clerk of said Court.

10 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake on the 13th day of October, A. D. 1874.

Present, the Hon. Ja's B. McKean, judge of the third judicial district.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. McALLISTER, DEFENDANT.

In this action the defendant having duly approved and filed his demurrer herein, and the same having been withdrawn in open court on the 15th day of April, 1874, with leave to defendant to answer within ten days thereafter, and the said defendant not having elected to answer, the time allowed by the court for answering having fully expired, and the default of the said defendant having been duly entered to law:

Now, on this day due proof having been made in open court of the damage sustained by plaintiff, on motion Tilford & Hagan, attorney' for plaintiff, it is ordered that the plaintiff have judgement for the sum of $\$3{,}300\frac{00}{100}$, and his costs taxed at $\$12\frac{50}{100}$.

I, E'w'd B. McKean, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court, this thirteenth day of January, A. D. 1875.

[SEAL.] E'W'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE, *Deputy Clerk.*

11 *Judgement.*

In the district court of the 3d judicial district of the Territory of Utah, county of Salt Lake.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. MCALLISTER, DEFENDANT.

In this action the defendant having duly appeared and filed his demurrer herein to the complaint herein, and the same having been by leave withdrawn in open court on the 15th day of April, 1874, with leave to defendant to answer within ten days thereafter, and the said defendant not having elected to answer, the time allowed by the court for answering having expired, and the default of the said defendant having been duly entered according to law:

Now on this day due proof of the damages sustained by plaintiff having been made in open court, on motion of Tilford & Hagan, attorneys for the plaintiff, it is ordered and adjudged that the plaintiff do have and recover from the said defendant the sum of three thousand and three hundred ($3,300\frac{00}{100}$) dollars, with interest thereon from the date hereof, at the rate of ten per cent. per annum until paid, to-

12 gether with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of twelve and $\frac{50}{100}$ dollars.

Judgement rendered October 13th, 1874.

13 Territory of Utah, third judicial district court, Hon. James B. McKean, judge.

BERTRAND KUHN
vs.
JOHN D. T. MCALLISTER.

The plaintiff and his counsel in the above-entitled case will take notice that on the 3d day of November, 1874, or as soon thereafter as counsel can be heard, move the court to vacate the judgment entered in this action on the 13th day of Oct. inst., and the default entered on the 28th day of April, 1874, and for leave to file an answer to the complaint for the reason that said default was made, and the judgement entered through a mistake of fact, which he believes an excusable neglect.

And as evidence of such mistake the defendant will read the affidavits hereto attached, and make use of the files in this case and the files in the case of D. R. Firman, assignee of Butterfield against Meyer Oppenheimer in this court.

Z. SNOW,
Att'y for McAllister.

(Indorsed:) Bertrand Kuhn vs. John D. T. McAllister. Notice of intent to make a motion to set aside a judgement. Copy of the within admitted October 29, 1874. Tilford & Hagan, att'ys for pl'ffs. Filed Oct. 29, 1874. E'w'd B. McKean, clerk.

14 Territory of Utah, third judicial district court, Hon. James B. McKean, judge.

BERTRAND KUHN
vs.
JOHN D. T. MCALLISTER.

Now comes John D. T. McAllister, the def't in the above-entitled case, and moves the court to vacate the judgment herein entered on the 13th

day of October, 1874, and the default of this def't entered on the 28th day of April, 1874, and grant leave to file an answer to the complaint, for the following reasons:

1. The default was suffered through a mistake of fact;
2. Or at least an excusable neglect.

Z. SNOW,
Attorney for Defendant.

(Indorsed:) Bertrand Kuhn vs. John D. McAllister. Motion to set aside judgement. Copy of within served Oct. 29, 1874. Tilford & Hagan, att'ys for pl'ffs. Filed Oct. 29, 1874. E'w'd B. McKean, clerk.

15 Territory of Utah, third judicial district court, Hon. James B. McKean, judge.

BERTRAND KUHN
vs.
JOHN D. T. MCALLISTER.

Be it remembered that on this 22d day of October, 1874, before me, Cora G. Snow, a notary public within and for Salt Lake County, in said Territory, personally appeared Richard McAllister of said county, who was by me sworn in due form of law, and who, on his oath, did depose and say that he is acquainted with John D. T. McAllister, the defendant in the foregoing action. That he, the said John D. T. McAllister, was acting territorial marshal of this Territory from an early part of the year 1872 to an early part of the year 1874; and that he, this affiant, during that time, was his deputy, and acting as such deputy.

He further says, that some time in the months of August or September, 1873, an execution came into his hands to be served, issued on a judgement of this court entered in a case wherein one D. R. Firman, assignee of one Butterfield, a bankrupt, was plaintiff, and one
16 Meyer Oppenheimer was defendant, on or about the 26th day of August, 1873, for between seven and eight thousand dollars, which said judgement had been assigned to one Patrick Lannan.

He further says that soon after said execution came into his hands to be served he, at the request of the said D. R. Firman, went to the office of the said Firman in Salt Lake City, the said Firman informing this affiant that there was at said office, in the hands of one Thomas Almy, five certificates of fifty shares each of the capital stock of the North Star Silver Mining Company, limited, which he, the said Firman, informed this affiant was the property of the said Meyer Oppenheimer.

That when at said office he, this affiant, saw the said Almy and informed him of the existence of said execution, and concerning the information beforementioned, derived from the said Firman, and that he had come to levy on said certificates of capital stock, when the said Almy also informed this affiant that these certificates of stock were the property of the said Meyer Oppenheimer, and that he held them subject to his order.

Thereupon the said Almy produced to this affiant the said five certificates of said capital stock of said company, and this affiant
17 levied upon them to satisfy said execution so far as this sale might produce the money.

He further says that Mess. Marshall & Royle were the attorneys for the said Firman, and Patrick Lannan the judgement creditor of the said Oppenheimer; that as soon as said levy had been made this affiant in-

formed the said Marshall and Royle concerning it, which met their approval, as this affiant then thought and still thinks.

He further says that a short time after the levy, and before the sale hereinafter mentioned, but the exact time this affiant is unable now to state, the said Bertrand Kuhn came to this affiant and professed to be the owner of these certificates of stock, but did not make known to this affiant his title to them. The certificates appear to have been issued to the said Meyer Oppenheimer, and the legal right to them appeared to be in him.

This affiant then informed the said Marshall & Royle, the said Firman, and the said Lannan, of the claim of the said Kuhn. They, the said Marshall & Royle, the said Firman and the said Lannan informed him that said claim was unfounded, and they would protect the
18 marshal and defend him against that claim.

Relying on this promise he, as such deputy marshal, acting under the counsel of the said Marshall and Royle, sold said shares of stock to the said Patrick Lannan, and delivered them to him, and Mess. Marshall & Royle, as attorneys for Patrick Lannan, appeared in this case, and in the name of John D. T. McAllister the defendant filed a demurrer to the plaintiff's complaint and continued to act in this case as such attorney until after the withdrawal of the demurrer, when Marshall & Royle sent a letter to him to the effect that they had withdrawn from this suit, and that the defendant must employ another attorney.

On the receipt of this letter he, this affiant, called on Mr. Lannan, the person beneficially interested, and informed him concerning this letter, when he, Patrick Lannan, informed this affiant that he had paid Mess. Marshall and Royle for their services, and they should not withdraw; that he had something to say about that. At all events, he said, "Go about your business; I will see that the case is attended to."

Acting under this instruction he, this affiant, went about his
19 business as usual, firmly believing that this case was receiving the attention which its merits required, nothing doubting but that it would either be settled by Patrick Lannan, or be otherwise attended to, and he knew nothing to the contrary until M'r Snow, another attorney of this court, called on him and informed him that Mess. Tilford and Hogan, the attorneys for the plaintiffs, spoke to him about this case, told him its situation, and said they supposed M'r Lannan had the stock, and if they would return the certificates they still receive them. This information was given to this affiant only a few days ago, being subsequent to the rendition of the judgement.

He further says that so soon as this information reached him he called on the said Lannan for information concerning it, and for an explanation of his conduct, when he informed this affiant that the certificates of stock were in Canada for sale, and that the said John D. T. McAllister could have the shares of stock for fifteen hundred dollars and not otherwise, and that he would not employ an attorney to defend this suit.

He further says that though he does not personally know as
20 there is a good defence to this suit, for the reason that he has no actual knowledge of the right or claim of the said Bertrand Kuhn to the said certificates of stock, but, from the information of others, he believes there is. At all events, he believes the judgment is much too high.

He further says, that the execution above referred to, returned by this affiant, is not on the files, and this affiant does not know where it

is. The return was written out for him by M'r Royle. He is therefore unable to produce it.

In conclusion, he says that the said John D. T. McAllister entrusted this entire matter to him, and knew nothing of the proceedings except as he learns it from this affiant; that he enables this affidavit to be used on a motion for setting aside the judgment and default in this case, and for leave to file an answer and make a defence to this suit.

R. N. MCALLISTER.

Subscribed and sworn to before me the day and year first above written.

In testimony hereof I have hereunto set my hand and affixed my seal at Salt Lake City, October 22, 1874.

[SEAL.] CORA G. SNOW,
Notary Public.

20½ (Indorsed:) Third district court. Bertrand Kuhn vs. J. D. T. McAllister, filed Oct. 29, 1874. E'w'd B. McKean, clerk. Affidavit of R. N. McAllister. Service of copy of within admitted Oct. 29, 1874. Tilford & Hagan, att'ys for pl't'ff. Z. Snow, for def't.

21 Territory of Utah, Salt Lake County, third judicial district court, Hon. James B. McKean, judge.

BERTRAND KUHN
vs.
JOHN D. T. MCALLISTER.

On this 22d day of October, 1874, before me, Cora G. Snow, a notary public within and for Salt Lake County, in said Territory, personally appeared John D. T. McAllister, of said county, who was by me sworn in due form of law, and who, on his oath, did depose and say that he, this affiant, is the defendant in this suit, and that he, this affiant, from an early part of the year 1872 to an early part of the year 1874, was the acting territorial marshal of this Territory, and that during that time Richard McAllister was his deputy.

That he, this affiant, has no knowledge concerning the facts in this suit except such as was derived from his said deputy. That he has read the affidavit of his deputy, Richard McAllister, made this day, to be used on the motions in this case, and that, according to his recollection, the statements therein are in accordance with his communications to him at the time of their occurrence.

That his understanding of the matter was that the case was to
22 be conducted by counsel employed by M'r Lannan, and he never knew anything to the contrary till M'r Snow, a few days ago, communicated to him the condition of the case. That he never had any personal conversation on the subject with either Mess. Marshall & Royle or M'r Firman or M'r Lannan.

He further says if the judgement in this case is permitted to stand he and his bail may have it to pay, and unless he can recover the amount from M'r Firman and M'r Lannan there will be a great loss to him for nothing but an error of judgement in the serving by his deputy a lawful writ in a manner which at the time was believed to be lawful.

He further says that had he known of the situation he should most assuredly have attended to it at the proper time.

JOHN D. T. MCALLISTER.

Subscribed and sworn to before me this 22d day of October, 1874.

In testimony hereof I have hereunto set my hand and seal at said county the day & year first above written.

[SEAL.] CORA G. SNOW,
Notary Public.

22½ (Indorsed:) Third district court. Bertrand Kuhn vs. J. D. T. McAllister. Filed Oct. 29, 1874. E'w'd B. McKean, clerk. Affidavit of J. D. T. McAllister. Service of copy of within admitted Oct. 29, 1874. Tilford & Hagan, att'ys for pl'ffs; Z. Snow, for def'ts.

23 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake, on the 1st day of December, A. D. 1874. Present, the Hon. Ja's B. McKean, judge of the third judicial district.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. MCALLISTER, DEFENDANT.

The motion of defendant to open default herein and set aside the judgement heretofore rendered against said defendant, coming on to be heard in open court, Z. Snow, esqr., appearing for defendant, and Mess. Tilford and Hagan appearing for plaintiff, and the same is now argued and submitted, and the court being fully advised denies said motion, to which ruling defendant excepts.

I, E'w'd B. McKean, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and the seal of said court, this thirteenth day of January, A. D. 1875.

[SEAL.] E'W'D B. MCKEAN, *Clerk*,
By WILLIS P. MCBRIDE,
Dep'y Clerk.

24 Third district court of Utah Territory.

BERTRAND KUHN
vs.
JOHN D. T. MCALLISTER.

Said defendant, by J. G. Sutherland, his counsel, moves this court for leave to renew the motion to set aside the judgment for said plaintiff entered in this cause, and the defendant's default heretofore argued and decided. And if such leave be granted that said motion be heard on the affidavits on file and the affidavits of said defendant Richard McAllister & Z. Snow, made on the 3d day of Dec., 1874.

I. G. SUTHERLAND,
Of Counsel for Def't.

On motion of J. G. Sutherland, of counsel for said defendant, it is ordered that the foregoing motion be heard on the 7th day of Dec'r, 1874, at 10 o'c. a. m., at the Federal court-room, Salt Lake City, subject to any and all objections on the part of the plaintiff, & that the

order & said motion, together with the affidavits on which the same is founded, be served on the plaintiff's att'ys to-day.

Dated Dec. 4, 1874.

JAMES B. McKEAN, *Judge.*

(Indorsed:) Filed Dec. 7th, 1874. E'w'd B. McKean, clerk.

25 Third district court of the Territory of Utah.

BERTRAND KUHN
vs.
JOHN D. T. McALLISTER.

SALT LAKE COUNTY, *ss:*

John D. T. McAllister, the above-named defendant, being duly sworn, says that he has fully and fairly stated the case in this action to his counsel therein, I. G. Sutherland; that deponent has a good and substantial defence to the action of said plaintiff, on the merits, as he is advised by his said counsel, after said statement made as aforesaid, and as deponent verily believes to be true.

Deponent further says he received the letter from Marshall & Royle annexed to the affidavit of Richard McAllister, this day made in this cause, and received said letter on the day of its date, or within a day or two afterwards; that deponent at once handed the same to Richard McAllister with instructions to carry said letter to Judge Z. Snow, and request him to defend this suit for deponent.

Deponent further says that he rested easy afterwards, in the confident expectation that his said attorney Znow and Lannan would take all necessary steps for deponent's defence; that deponent heard nothing contrary until informed of the rendition of the judgment a few days ago.

JOHN D. T. McALLISTER.

Sworn to and subscribed before me this 3d day of Dec'r, 1874.
[SEAL.] CORA G. SNOW,
Notary Public.

(Indorsed:) 3d district court. Bertrand Kuhn vs. John D. T. McAllister. Aff't of defendant. Filed Dec'r 7, 1874. Edw'd B. McKean, clerk.

26 Third district court of the Territory of Utah.

BERTRAND KUHN
vs.
JOHN D. T. McALLISTER.

SALT LAKE COUNTY, *ss:*

Richard McAllister, being duly sworn, says that the annexed letter was handed to deponent by said defendant on the day it is dated, or within a day or two afterwards; that on the same day he had the interview with P. H. Lannan, mentioned in deponent's affidavit made on the 22d day of October, 1874. In addition to what was stated in that affidavit, said Lannan said he would return the stock in question rather than have the marshal suffer for making the sale.

Deponent further says that by direction of said defendant, on the same day he received said letter & had said talk with said Lannan, he

requested Z. Snow, esqr., to attend to this suit for said defendant. Deponent explained said case to him—Lannan's conversation, showed him the annexed letter, and said Snow promised to do what was necessary for said defendant; that deponent reported to defendant at once the said conversations with Lannan & Snow.

R. N. McALLISTER.

Sworn to & subscribed before me this 3d day of December, 1874.
[SEAL.] CORA G. SNOW,
Notary Public.

(Indorsed:) Third district court. Betrand Kuhn vs. John D. T. McAllister. Aff't R. W. McAllister. Filed Dec. 7, 1874. E'w'd B. McKean, clerk.

27 SALT LAKE, *April* 15, 1874.

JOHN D. T. McALLISTER, ESQR.:

D'R SIR: Owing to the position we have taken in the matter of the Utah Windsor M. Co. vs. R. S. Burton et al., and are compelled to take therein, we feel it impossible for us to fight your case of A. Kuhn vs. you, and have so notified M'r P. Lannan. You have ten days from today to file your answer. We would advise you at once to see M'r Lannan and have him retain new attorneys.

We hereby notify you of our withdrawal from this cause, as we have notified M'r Lannan, by whom we were engaged thereto.

Yours,

MARSHALL & ROYLE.

28 Third district court of the Territory of Utah.

BERTRAND & KUHN
vs.
JOHN D. T. McALLISTER.

SALT LAKE COUNTY, *ss:*

Zerubbabel Snow, being duly sworn, says that he has read the affidavit made in this cause this day by said defendant and Richard McAllister; that deponent is convinced that said Richard conveyed to deponent defendant's request therein mentioned to appear for him to defend this suit, though deponent does not now recall the occasions and circumstances thereof; that deponent has conversed with said Richard on the subject.

Deponent, by way of excuse for not putting in an answer, says that he either did not understand the request, or, by reason of a press of other business and the infirmaties of age, forgot the case.

Deponent further says that the first notice he had of the judgment rendered in this action was received by deponent from the plaintiff's attorneys immediately before making the former affidavits for setting aside the default.

Z. SNOW.

Sworn to & subscribed before me this 2d day of Dec'r, 1874.
[SEAL.] CORA G. SNOW,
Notary Public.

(Indorsed:) 3d district court. Bertrand Kuhn vs. John D. T. McAllister. Aff't of Z. Snow. Filed Dec'r 7th, 1874. E'w'd B. McKean, clerk.

29 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake on the 7th day of December, A. D. 1874.

Present the Hon. Ja's B. McKean, judge of the third judicial district.

BERTRAND KUHN, PLAINTIFF,
vs.
JOHN D. T. MCALLISTER, DEFENDANT.

This cause coming on for hearing on the application for leave to renew the motion to open default, after argument by respective counsel, it is ordered that the application be, and the same is hereby, refused.

I, E'w'd B. McKean, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of this court this thirteenth day of January, A. D. 1875.

[SEAL.] E'W'D B. MCKEAN, *Clerk*,
By WILLIS P. MCBRIDE, *Dep. Clerk*.

30 Third district court of the Territory of Utah.

BERTRAND KUHN
vs.
JONH D. T. MCALLISTER.

To Edw' B. McKean, clerk of said court, and Mess' Tilford & Hagan, plaintiff's attorneys:

Take notice that said defendant appeals to the supreme court of the Territory of Utah from the judgment of the third district court of said territory rendered in this cause in favor of said plaintiff and against said defendant on the 13th day of October. 1874, for the sum of three thousand three hundred dollars and costs of suit, and from the whole thereof.

Also from an order of said district court made & entered in this action on the 2d day of Dec'r, 1874, denying a motion made in behalf of said defendant to set aside the said judgement, and the default of said defendant entered for want of an answer in this action on the 28th day of April, 1874, and for leave to answer the complaint therein, said defendant also appeals to said supreme court from an order made & entered in this action on the 7th day of December, 1874, by said district court refusing to grant leave to said defendant to renew said motion to set aside said judgement and default, and from the whole of said orders.

Z. SNOW,
Att'y for Def'ts.

Dated Dec. 9, 1874.

(Indorsed:) Third district court. Bertrand Kuhn vs. John D. T. McAllister. Notice of appeal. Filed Dec'r 10, 1874. E'w'd B. McKean, clerk. Service accepted Dec. 10, 1874. Tilford & Hagan, att'y' for pl'ff.

31 Third district court of the Territory of Utah.

BERTRAND KUHN
vs.
JOHN D. T. MCALLISTER.

Whereas the defendant in the above-entitled action is about to appeal

to the supreme court of the Territory of Utah from a judgement of the district court of the third judicial district of this Territory, entered on the 13th day of October, 1874, wherein the court last aforesaid entered judgment against said defendant & for plaintiff, for the sum of three thousand three hundred dollars and costs of suit, and from an order of said last-mentioned court entered on the 2d day of December, 1874, denying an application of the defendant to vacate said judgment, & a default entered by the clerk of said court on the 28th day of April, 1874, & for leave to file an answer to said action, and from an order in said action made by said district court on the 7th day of December, 1874, refusing to grant leave to said defendant to renew the said motion to set aside said judgment & default, and from all of the proceedings in said case:

Now, therefore, in consideration of said appeal & of the premises, we, the undersigned, of the city of Salt Lake, in the county of Salt
32 Lake & Territory of Utah, do hereby jointly and severally undertake & promise, on the part of the appellant, that he, the said appellant, will pay all damages and costs that may be awarded against him on the appeals, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying execution of this judgment so appealed from: We do further, in consideration thereof & of the premises, jointly and severally, undertake & promise, & do acknowledge ourselves further jointly & severally bound in the sum of six thousand eight hundred , being more than double the amount named in said judgment, that of the judgment appealed from or any part of the amount directed to be paid thereby be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, & all damages & costs which shall be awarded against the appellant upon such appeal.

Witness our hands and seals this Dec. 9th, 1874.

JOHN D. T. McALLISTER. [SEAL.]
H. DINWOODY. [SEAL.]
SOREN P. NEVE. [SEAL.]

33 TERRITORY OF UTAH,
Salt Lake County, ss:

We, Soren Neve & Henry Dinwoody, make oath & say that we are the sureties in the foregoing; that we reside in Salt Lake City, in the county of Salt Lake and Territory of Utah; that the said Soren Neve is engaged in the business of upholstering, and the said Henry Dinwoody is engaged in the business of dealing in furniture.

And each for himself says that he is worth more than seven thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

H. DINWOODY.
SOREN P. NEVE.

Sworn and subscribed before me this 10th day of Dec., 1874.
E'W'D B. McKEAN, *Clerk.*

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, E'w'd B. McKean, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original papers on file and orders of court in the above case that appear of record in my office.

Witness my hand and the seal of said court, at Salt Lake City, the 13th day of Jan., A. D. 1875.

[SEAL 3 DISTRICT COURT.] E'W'D B. McKEAN, *Clerk*,
By WILLIS P. McBRIDE,
Dep'y Clerk.

33½ (Indorsed:) Third district court. Bertrand Kuhn vs. John D. T. McAllister. Undertaking on appeal. Filed Dec. 11th, 1874. E'w'd B. McKean, clerk, by Winfield S. Sterling, deputy clerk.

34 *Extract from supreme court journal, Utah Territory, June* 18, 1875.

BERTRAND KUHN, RESPONDENT,
vs.
JOHN D. T. MCALLISTER, APPELLANT.

Appeal from 3d district court.

This cause having been fully argued by J. G. Sutherland, esqr., for appellant, and J. Tilford, esqr., for respondent, was submitted and taken under advisement by the court.

Court adjourned till to-morrow at 9.30 a. m.

35 *Extract from supreme court journal, Salt Lake City, Utah Territory, June* 30, 1875.

BERTRAND KUHN, RESPONDENT,
vs.
JOHN D. T. MCALLISTER, APPELLANT,

Appeal from 3d district court.

This cause having been heretofore fully argued in open court by counsel for the respective parties, and the court being fully advised in the premises, it is ordered and adjudged that the judgment of the court below be, and it is hereby, in all respects affirmed, with costs.

36 UNITED STATES OF AMERICA:

Supreme Court.

JOHN D. T. MCALLISTER, PL'FF IN ERROR AND appellant,
vs.
BERTRAND KUHN, DEF'T IN ERROR AND appelle'.

Now comes John D. T. McAllister, above named, by Z. Snow & Sutherland & Bates, his att'ys, and says there is error in the record & proceedings of this case, in this, viz:

1. Shares of stock in a foreign corporation being intangible & only representing a right of the owner to receive dividends of profit, if any accrues during its existence, and a right to receive portions of the surplus, if any, at its dissolution, cannot against the will of the owner be wrongfully taken & converted to the use of another. Therefore, the averment in the complaint that McAllister, on or about the 1st day of September, 1874, at Salt Lake City, in the Territory of Utah, against

the will of the said Bertrand Kuhn, wrongfully took the shares of stock in the complaint mentioned & converted them to his use is an averment of an impossible thing, and asserts no issuable facts.

37 2. The averment in the complaint that the two hundred and fifty shares of stock of said foreign corporation is contained in and represented by five certificates signed as in said complaint alleged is only a conclusion of law, and therefore does not tender an issue of fact.

3. The foreign corporation mentioned in the complaint being a subject of the Dominion of Canada, is to be governed & controlled by the laws of that Dominion, whatever those laws may be, and there is no averment in the complaint showing in what manner those shares can be transferred to the said McAllister, nor how he could obtain a right to them against the consent of the said Kuhn.

4. A foreign corporation has only the locality of the sov'reignty of its creation, which, in this case, is the Dominion of Canada, but its shares are attached to, and cannot be separated from, the person of the owner. They have no identity elsewhere. This identity is not corporeal. Therefore, the averment that McAllister took them against the will of Kuhn & wrongfully converted them to his use is only an erroneous con-

38 clusion of law, not an averment of a fact.

5. The court erred in as'essing the damages without submitting that question to a jury.

6. The court erred in not, pursuant to McAllister's motion, opening the judgment and setting aside the default, and in refusing McAllister's leave to defend the action.

7. The supreme court of the Territory erred in affirming the judgment of the district court.

For these and other manifest errors in the record and proceedings, the said John D. T. McAllister prays that the judgment of the supreme court of the Territory may be reversed.

Z. SNOW,
Att'y for McAllister.

(Indorsed:) Supreme Court of the United States. John D. T. McAllister vs. Bertrand Kuhn. Assignment of errors. Filed in the office of the clerk of the supreme court of the Territory of Utah this 8th day of July, A. D. 1875. Cha's A. Gould, clerk.

39 UNITED STATES OF AMERICA, *ss:*

To Bertrand Kuhn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed and filed in the clerk's office of the supreme court of the Territory of Utah, wherein John D. T. McAllister is appellant and you are appellee, on appeal, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done in that behalf.

Witness the Hon. Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 8th day of July, 1875.

D. P. LOWE,
Chief-Justice of the Supreme Court of the Territory of Utah.

(Indorsed:) J. D. T. McAllister vs. Bertrand Kuhn. Copy of within citation served this 9th day of July, A. D. 1875. F. Tilford, att'y for respondent. Filed in the office of the clerk of the supreme court of

Utah Territory this 9th day of July, A. D. 1875. Cha's A. Gould, clerk supreme court, Utah T'y.

40 THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

JOHN D. T. MCALLISTER }
vs.
BERTRAND KUHN. }

Know all men by these presents that we, John D. T. McAllister, as principal, and Henry Dinwoody and Soren P. Neve, as sureties, all of the city and county of Salt Lake, in the Territory of Utah, are held and firmly bound unto the above-named Bertrand Kuhn in the sum of seven thousand dollars, to be paid to the said Bertrand Kuhn, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, signed by our hands and sealed with our seals this second day of July, 1875.

Whereas the above-named John D. T. McAllister hath prosecuted an appeal to the Supreme Court of the United States to reverse the
41 judgment rendered in the above-entitled suit by the supreme court of the Territory of Utah:

Now, therefore, the condition of the above obligation is such, that if the above-named John D. T. Mc*Mc*Allister shall prosecute said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

JOHN D. T. MCALLISTER. [SEAL.]
S. P. NEVE. [SEAL.]
H. DINWOODY. [SEAL.]

Signed, sealed, and delivered in presence of—

TERRITORY OF UTAH,
Salt Lake County, ss:

On this second day of July, 1875, before me, Cora G. Snow, a notary public within and for Salt Lake County, personally appeared Henry Dinwoody, Soren P. Neve, and , at said county, who
42 were by me sworn in due form of law, and who on their respective oaths did depose and say, each for himself, that he is a resident of Salt Lake County and a householder therein, and that he is one of the sureties in the above-entitled bond, and that his property is worth the amount therein stated as the penalty thereof over and above all his debts and property exempt by law from execution.

JOHN D. T. MCALLISTER.
S. P. NEVE.
H. DINWOODY.

Subscribed and sworn to before me the day and year first above written.

[SEAL.]

CORA G. SNOW,
Notary Public.

The above and foregoing bond for supersedeas is this day affirmed by me.

Witness my hand this 8th day July, 1875, at Salt Lake City.

D. P. LOWE,
C. J. Sup. Court, Utah.

(Indorsed:) John D. T. McAllister vs. Bertrand Kuhn. Undertaking on appeal. Filed in the office of the clerk of the supreme court of Utah Territory this 9th day of July, A. D. 1875. Cha's A. Gould, clerk of the supreme court of Utah Territory.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the Territory of Utah before you, between John D. T. McAllister, appellant, and Bertrand Kuhn, appellee and respondent, a manifest error hath happened, to the great damage of the said John D. T. McAllister, as by the complaint appears, and it being fit that the error, if any there be or hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and

44 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 11th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, according to law and the custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 2d day of July, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.] CHA'S A. GOULD,
Clerk of the Supreme Court of Utah Territory.

(Indorsed:) J. D. T. McAllister vs. Bertrand Kuhn. Writ. Filed in the office of the clerk of the supreme court of the Territory of Utah this 8th day of July, A. D. 1875. Cha's A. Gould, clerk of the supreme court of Utah Territory.

45 UNITED STATES OF AMERICA, *ss:*

To Bertrand Kuhn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein John D. T. McAllister is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Hon. Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 8th day of July, 1875.

D. P. LOWE,
Chief-Justice of the Supreme Court of the Territory of Utah.

(Indorsed:) J. D. F. McAllister vs. Bertrand Kuhn. Copy of within citation served this 9th day of July, A. D. 1875. F. Tilford, att'y for respondent. Filed in the office of the clerk of the supreme court of Utah Territory this 9th day of July, A. D. 1875. Cha's A. Gould, clerk supreme court, Utah T'y.

46 THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

JOHN D. T. MCALLISTER } vs. BERTRAND KUHN. } In error.

Know all men by these presents that we, John D. T. McAllister, as principal, and Henry Dinwoody and Soren P. Neve, as sureties, all of the city and county of Salt Lake and Territory of Utah, are held and firmly bound unto the above-named Bertrand Kuhn in the sum of seven thousand dollars, to be paid to the said Bertrand Kuhn, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, signed with our hands and sealed with our seals this second day of July, 1875.

47 Whereas the above-named John D. T. McAllister hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the Territory of Utah:

Now, therefore, the conditions of the above obligation is such, that if the above-named John D. T. McAllister shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

JOHN D. T. MCALLISTER. [L. S.]
H. DINWOODY. [L. S.]
SOREN P. NEVE. [L. S.]

Signed, sealed, and delivered in presence of—
Z. SNOW.

48 TERRITORY OF UTAH,
Salt Lake County, ss:

On this second day of July, 1875, before me, Cora G. Snow, a notary public within and for Salt Lake County, personally appeared Henry Dinwoody and Soren P. Neve, at said county, who were by me sworn in due form of law, and who, on their respective oaths, did depose and say, each for himself, that he is a resident of Salt Lake County and a householder therein, and that he is one of the sureties in the above-entitled bond, and that his property is worth the amount therein stated as the penalty thereof over and above all his debts and property exempt by law from execution.

S. P. NEVE.
H. DINWOODY.

Subscribed & sworn to before me the day & year first above written.
[SEAL.] CORA G. SNOW,
Notary Public.

49 The above and foregoing bond for supersedeas is this day approved by me.

Witness my hand this 8th day of June, 1875, at Salt Lake City.

D. P. LOWE,
C. J. Sup. Court of Utah.

(Indorsed:) J. D. T. McAllister vs. Bertrand Kuhn. Undertaking on writ of error. Filed in the office of the clerk of the supreme court of Utah Territory this 9th day of July, A. D. 1875. Cha's A. Gould, clerk supreme court of Utah Territory.

50 United States of America to Supreme Court of the United States.

TERRITORY OF UTAH,
Salt Lake County:

Supreme court of the Territory.

In obedience to the commands of the writ of error & notice of appeal hereto attached, I, Cha's A. Gould, clerk of the supreme court of the Territory of Utah, hereby certify that the foregoing is a full, true, and correct transcript of the records and proceedings had in the supreme court of the Territory of Utah, in the case of Bertrand Kuhn and John D. T. McAllister being the same case referred to in said writ of error and said notice of appeal.

In testimony whereof I have hereunto set my hand & affixed the seal of the said supreme court, at Salt Lake City, this 28th day of Sept'r, 1875.

[SEAL.]

CHA'S A. GOULD,
Clerk of the Supreme Court,
By JOHN L. VANDEWATER,
Dep'ty Clerk.

51 In the supreme court of the Territory of Utah, January term, 1875.

BERTRAND KUHN, RESPONDENT,
vs.
JOHN D. T. MCALLISTER, APPELLANT.

Appeal from the 3d district court.

Boreman, J., delivered:

This is a suit to recover damages for the conversion by the defendant of two hundred and fifty shares of capital stock of a mining company.

In the court below judgment went against the defendant by default, and defendant has appealed to this court, and now here alleges that the complaint does not state facts sufficient to constitute a cause of action. The insufficiency is alleged to consist in bringing this suit for damages for the conversion of "shares of stock," as shares are incorporeal, and a party cannot be charged with taking and converting the same;

52 or, in other words, that this is an action of trover, and that the trover cannot be maintained for shares of stock. We do not think that this is exactly the question which we are called upon to consider.

It is not necessary for us to consider that this is an action of trover, and that trover is not the proper remedy. To do so would be to tie the

pleadings down again to set forms. Some of the language used may be that used in trover, but some certainly is not, and it matters very little under the practise act whether the language used be that belonging to the form of one action or another, or to no form of action. The material question is, do the facts stated show the plaintiff entitled to any remedy, legal or equitable? If so, then the court could not say that the complaint did not state facts sufficient to constitute a cause of action.

It is asserted that the defendant "took" these shares, and great stress is laid upon that word. If this were an action in trover, that word would not be proper—it belongs to replevin—but the word "found" would take its place; yet whether the one or the other word be used, it
53 would, in trover, be not very material, as the gist of the action is the conversion.

But cannot a man convert shares in stock? He can mortgage them; they can be sold under judgment and execution; they can be attached; and they can be pledged. (Wilson vs. Lith, 2 Comstock, 443.)

At common law, strictly speaking, shares could neither be mortgaged, sold under execution, attached, or pledged. This rule has, however, been greatly relaxed in some instances by statute, and in others by the rulings of the courts. Joint-stock companies are becoming so numerous, and so large an amount of the property of the community is invested in them, that it becomes a necessity to treat stocks very much as other personal property.

Hence we find in Massachusetts it is held that a contract for the sale of shares in a manufacturing company is a contract for the sale of goods, wares, and merchandise, (Tisdale vs. Harris, 9 Pick., 9,) and where, in New York, stock has been wrongfully converted by a trustee, the cestui que trust may either compel a redelivery of the stock or claim
54 the value at the time of the conversion. (Hart vs. Ten Eyck, 2 John., ch. 117.)

This more modern and liberal rule is recognized also in California. (Atkins vs. Gamble, 42 Cal., 100.) And in New York we find that stock is recognized as a subject of conversion, and suit can be brought therefor, and a recovery of the value had. (Anderson vs. Nicholas, 28 N. Y., 600.)

Likewise, in Nevada, we find the right to sue for the conversion of stock. In 8th Nevada, 352, (Boylan vs. Hujuel,) there is a case of this character. It is a' action in trover for the conversion of mining-stock. The rule seems to be settling down to be that shares are to be treated as other personal property. The word share seems to used much of the time the reports as including the certificate, which certainly is tangible, and in the case before us the word share is declared to be embraced in the certificate; and if the share be taken, it necessarily follows that the certificate was.

But this is not left to mere inference, for the complaint says that defendant "took" the said two hundred and fifty shares described
55 as aforesaid. "They were described as contained and represented by" the certificates. But, formerly, at common law, the certificates were in the same situation as the shares, for neither could be the subject of an action of trover. It is admitted by the appellant that trover can be maintained for certificates of stock.

From what we have said, therefore, we conclude that the complaint is sufficient to support the judgment.

Upon the application for a new trial, the affidavits filed show that Richard W. McAllister took the shares, but that he was entrusted with the whole matter by the defendant, for whom he was acting. He was

thus the agent of the defendant. This fact does not show merits in the defence, for the action of Richard W. was the action of the defendant.

As to the conversion, it makes no matter of difference that some other party took the property in the first instance. Briggs vs. Wagenhein, Cal. (Cal. S. A., Oct. 7, 1869.)

Where "certificates of stock" were even purchased from an-
56 other, the holder was liable if they were wrongfully taken from the owner, and the purchaser had reason to suspect this, (Anderson vs. Nicholas, 28 N. Y., 600.) The witness' seem to swear to all they knew about the case, yet we can discover no special merits that would justify a reversal of the action of the court below, if the defendant did not show proper diligence.

And we do not think any diligence whatever was used; certainly no reasonable diligence was used. The action was begun on the 9th of September, 1873, and upon the following day defendant was served with the summons. On the 18th day of said September he appeared and demurred. On the 15th of April, 1874, he withdrew the demurrer, and took ten days in which to answer. On 28th of same month, (April,) no answer having been filed, default was entered. Then, on the 13th of October following, nearly six months after default, plaintiff introduced his proof, and judgment was entered in his favor. Afterwards, on the 25 of October, defendant filed his motion for new trial, having given notice on the same day. The motion was denied, and a few days afterwards renewed.

We do not think this shows very great diligence, especially
57 when we remember that the affidavits allege that the defendant was the acting officer of the very court in which this case was pending. The only excuse given for the negligence is that he depended upon the words of other men in regard to making him safe. If such a negligence be excusable in one case, it should be so in all; but if admitted as good, it would lead to great confusion, and parties would never know when their cases were really settled.

The judgment and subsequent action of the court below is affirmed.

Lowe, C. J., concurs.

(Indorsed:) In supreme court. January term, 1875. Bertrand Kuhn, respondent, vs. John D. T. McAllister, appellant. Opinion of the court. By Boreman, Justice.

(Indorsement on cover:) No. 155. John D. T. McAllister, plaintiff in error, vs. Betrand Kuhn. Utah Terr'y sup. court. Filed 5th October, 1875.

REC. 155—3

IN THE

Supreme Court of the United States.

JOHN D. T. McALLISTER,
PLAINTIFF IN ERROR,
vs.
BERTRAND KUHN.

In error to the Supreme Court of the United States for the Territory of Utah.

Motion to Dismiss Writ of Error, and to Affirm Judgment of the Court below.

BRIEF FOR DEFENDANT.

JAMES H. MANDEVILLE, *Counsel.*

WASHINGTON:
TURNER & WHITE, LAW PRINTERS, WEBSTER LAW BUILDING, LA. AVE.
—o—
1877.

IN THE

Supreme Court of the United States.

No. 155. OCTOBER TERM, 1877.

JOHN D. T. McALLISTER,
PLAINTIFF IN ERROR,
vs.
BERTRAND KUHN.

In error to the Supreme Court of the United States for the Territory of Utah.

Motion to Dismiss Writ of Error, and to Affirm Judgment of the Court below.

Now comes the defendant in error, by his counsel, and moves the Court to dismiss the plaintiff's writ of error, and to affirm the judgment of the Supreme Court of Utah Territory, in accordance with its 6th rule:

"There may be united, with a motion to dismiss a writ of error to a State court, a motion to affirm on the ground that although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

And as grounds for the above motion the defendant says,—

That this action originally was begun at Salt Lake

City, Utah, September 9th, 1873. On the next day summons was served upon the defendant in person. September 18th he appeared and demurred, but April 15th, 1874, he withdrew his demurrer and took ten days for answer. April 28th, no answer having been filed, a default was entered. October 13th, the plaintiff having introduced his proofs, the Court assessed the damages and entered judgment in his favor. October 25th the defendant moved to vacate the judgment, but the court, December 1st, denied his motion; and on December 7th, it also denied his application to renew the motion to open default. December 9th, he appealed to the Supreme Court of Utah Territory where on June 30th, 1875, the judgment of the court below was affirmed. July 8th following, the defendant in the original action sued out a writ of error to this Court.

The defendant in error further says,—that the above statement of facts, supported by the transcript of record on file before this Court, shows that the plaintiff in error did not prosecute his defense with diligence, in this, that he did not move to set aside the default until after the rendering of judgment, which was about six months after his default of answer to the complaint.

As objection to the sufficiency of the complaint was waived by a withdrawal of the demurrer, and as the alleged insufficiency of the complaint, if any, was cured by the judgment, there are no questions of importance to be determined by this Court. The questions of assessment of damages by the court instead of by a jury, and the vacating of judgments rendered by default were settled long years ago and the Court should be spared the infliction of having to decide them over again.

Although the 6th rule says "a writ of error toa State

court," it is believed that the spirit of the rule includes a writ of error to a *Territorial* court.

Wherefore, this defendant in error moves this Court to dismiss the plaintiff's writ of error, to affirm the judgment of the Supreme Court of Utah Territory, with all costs of action, and to grant additional relief under the 23rd rule of this Court, to wit: damages at the rate of ten per cent. in addition to the interest awarded upon the amount of the judgment.

Respectfully submitted,

JAMES H. MANDEVILLE,

Counsel for Defendant.

Washington, D. C., September 15th, 1877.

IN THE

Supreme Court of the United States.

No. 155. OCTOBER TERM, 1877.

JOHN D. T. McALLISTER,
PLAINTIFF IN ERROR,
vs.
BERTRAND KUHN.

In error to the Supreme Court of the United States for the Territory of Utah.

Brief for the Defendant in Error.

STATEMENT OF THE CASE.

This action was begun in the district court of the 3rd judicial district of the Territory of Utah, at Salt Lake City, September 9th, 1873.

The complaint alleged:

1st. That the plaintiff on the 1st day of September, 1873, was the owner of 250 shares unassessable of the paid-up capital stock of The North Star Silver Mining Company, existing under the laws of the Dominion of Canada, and were represented by 5 certificates, each certificate being for 50 shares, and signed on the face thereof by the secretary, treasurer and president of said company.

2nd. That the said 250 shares were then of the value of $12,000.

3rd. That on or about the 1st day of September, 1873, while the plaintiff was the owner and lawfully entitled to their possession, the defendant at Salt Lake City, without the plaintiff's consent and wrongfully, took the said 250 shares and converted them unlawfully and wrongfully to his own use, to the damage of the plaintiff in the sum of $25,000.

4th. That before the commencement of this action the plaintiff demanded of the defendant, on the 6th day of September, 1873, possession of the said stock, but that the defendant refused to return the same, and still retains possession thereof from the plaintiff.

Wherefore plaintiff demands judgment against the defendant for the sum of $25,000 and his costs of action.

September 10th, 1873, summons was served upon the defendant in person.

September 18th, he appeared and filed the following demurrer:

1st. That the said complaint does not state facts sufficient to constitute a cause of action.

2nd. That said complaint is ambiguous and uncertain in this, that it does not describe the property alleged to have been taken and converted, so that it can be identified.

3rd. That the complaint does not show to whom the 5 certificates of stock were issued, or to whom payable, whether they are owned by the payee therein or his assignee. The numbers of the certificates are not given. It is not stated that they were all the certificates issued. The value of each of them is not given, nor their terms and conditions, in substance or in fact.

April 15th, 1874, the defendant applied to the court for leave to withdraw his demurrer and for ten days to answer, which was granted.

April 28th, no answer having been filed, a default was entered.

October 13th, the plaintiff having introduced his proofs, the court assessed the damages and entered judgment in his favor for "$3,300 with interest thereon from October 13th, 1874, at the rate of 10 per cent per annum until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $12.50."

October 25th, the defendant moved to vacate the judgment, but the court December 1st, denied his mo-

tion; and on December 7th, it also denied his application to renew the motion to open default.

December 9th, 1874, the defendant appealed to the Supreme Court of Utah Territory, where, on June 30th, 1875, the judgment of the court below was affirmed. That court held that the complaint was sufficient to support the judgment; that the marshal was liable for the acts of his deputy; and that the appellant used no diligence in defending the suit against him.

July 8th, 1875, the defendant sued out a writ of error to the Supreme Court of the United States.

The following errors are assigned for review here:

1st. Shares of stock in a foreign corporation being intangible and representing a right of the owner to receive dividends of profit if any accrues during its existence, and a right to receive portions of the surplus, if any, at its dissolution, cannot against the will of the owner be wrongfully taken and converted to the use of another. Therefore the averment in the complaint, that McAllister, on or about the 1st day of September, 1873, at Salt Lake City, in the Territory of Utah, against the will of the said Bertrand Kuhn, wrongfully took the shares of stock in the complaint mentioned and converted them to his own use, is an averment of an impossible thing, and asserts no issuable facts.

2nd. The averment in the complaint that the 250 shares of stock of said foreign corporation is contained in and represented by 5 certificates signed as in said complaint alleged, is only a conclusion of law, and therefore does not tender an issue of fact.

3rd. The foreign corporation mentioned in the complaint being a subject of the Dominion of Canada, is to be governed and controlled by the laws of that Dominion, whatever those laws may be, and there is no averment in the complaint showing in what manner those shares can be transferred to the said McAllister, nor how he could obtain a right to them against the consent of the said Kuhn.

4th. A foreign corporation has only the locality of the sovereignty of its creation, which in this case is the Dominion of Canada, but its shares are attached to and cannot be separated

from the person of the owner. They have no identity elsewhere. This identity is not corporeal. Therefore the averment that McAllister took them against the will of Kuhn and wrongfully converted them to his use, is only an erroneous conclusion of law, not an averment of a fact.

5th. The court erred in assessing the damages without submitting that question to the jury.

6th. The court erred in not, pursuant to McAllister's motion, opening the judgment and setting aside the default, and in refusing McAllister leave to defend the action.

7th. The Supreme Court of the Territory erred in affirming the judgment of the district court.

7 Wall 499
18 Id 99
2 Otto 90

BRIEF.

The 1st, 2nd, 3rd and 4th assignments of error, if considered, should be overruled by this court.

By electing to demur instead of answer, the plaintiff in error has admitted that he has no ground for denial or traverse. Not having denied the seizure he admits that he wrongfully took the defendant's property, and it is sophistry for him to plead here that because the property was shares of mining stock in a foreign corporation, it could not be wrongfully taken and converted to the use of another, against the fact that it was so disposed of, and that by his wrongful act the defendant has suffered the loss of his stock.

He is liable for the wrongful seizure.

3 Wall., 334.

If no demurrer had been filed it is admitted that the plaintiff in error did not waive his objection to the sufficiency of the complaint, and if the demurrer had been overruled that he still would be deemed to deny the facts. But having demurred, it is here urged by the defendant, that any objection to the sufficiency of the complaint, can be maintained only by reason of a judg-

ment upon demurrer. By withdrawing the demurrer, he is a step beyond the condition of not having demurred at all,—he then confessed the complaint to be sufficient. He expressly waived all objections to its sufficiency by the withdrawal and in effect said: "The complaint is sufficient, the court will overrule my demurrer, and therefore I pray leave to answer." He is estopped here from alleging that the complaint is insufficient to support the judgment, for he has admitted to the contrary. By offering to answer he is as much estopped from such an allegation as though he had answered. If he had intended to seek from this court an opinion upon the alleged insufficiency of the complaint, he should have refused to withdraw his demurrer and demanded judgment thereon, or else have not demurred at all. If overruled, then he might charge error and ask this court to review it.

1 Wall., 42.
5 How., 51.

After obtaining leave of court to answer, which he failed to do, he should be presumed to confess the justice of the complaint, and this presumption is strengthened from the fact that he made no effort to have the default set aside until after an entry of judgment, about six months afterwards. Howsoever much he may have relied upon the promises of others, and upon his attorney, to protect him in the suit, his neglect for a period of about six months in moving to set aside the default, and not then until after an entry of judgment against him, should of itself be a complete bar to his obtaining any redress before this court. He waived the benefit of a trial and now the judgment should be enforced. After his neglect it is expected that this court will rebuke him for suing out a writ of error, thereby taking advantage of his own wrong and inattention, and inter-

20 Wall 8

posing great delay in the administration of justice.

7 How., 717, 718.
1 Oregon, 226.

But any defect in a complaint, like the case at bar, should be held as cured by the judgment, especially when rendered in default of answer. Having withdrawn his demurrer his objection comes after judgment. This court has affirmed judgments in face of manifest errors on the record which were cured by a verdict.

11 Wall 268

4 How., 167.
Peter's C. C. Reports, 476.

II.

23 How 456
22 Wall 77

In answer to the 5th assignment of error,—this court has approved the act of a court of original jurisdiction in assessing damages, where the judgment was rendered by default.

3 Dallas, 344.

The plaintiff in error has not attempted to show that the court below abused its authority.

The assessment was sanctioned by the civil practice act of Utah.

Sections 151, 179.

III.

In answer to the 6th and 7th assignments of error,—a motion to set aside a judgment on default, is an application addressed to the sound discretion of the court below, and no appeal lies from its decision ; nor is it the subject of a bill of exception or writ of error.

18 How., 394.

This court has repeatedly refused to review on writ of error an order of the court below refusing to grant

a new trial, and it is idle to bring writs of error here based on such grounds.

4 Wheaton, 220.
7 Id., 248.
20 How., 29.
24 Id., 303.

IV. 12 Wall 164, 440

The defendant in error invokes this court to affirm the judgment of the court below, which approved the judgment of the district court of the 3rd judicial district of Utah Territory. 9 Pet 275 22 How 503 23 Id 320 6 Wall 513

And the defendant in error also invokes this court to apply its 23rd rule,—"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of 10 per cent. in addition to interest, shall be awarded upon the amount of the judgment." 10 Id 421 15 Id 384 1 Otto 356

Respectfully submitted,

James K. Mandeville.

Counsel for Defendant.

September 15th, 1877.

IN THE

SUPREME COUR

OF THE

UNITED STATES.

[No. 155.]

JOHN D. T. McALLISTER, PLAINTIFF IN ERROR,

vs.

BERTRAND KUHN.

IN ERROR TO THE SUPREME COURT OF THE TERR
TORY OF UTAH.

Motion to dismiss Writ of Eerror, and to affirm Judgment of the Court below, and Argument on the Me

BRIEF FOR PLAINTIFF IN ERRC

Z. SNOW,
Counsel and Attorney for Plaintiff in

JAMES H. MANDEVILLE,
Counsel for Defendant.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

[No. 155.]

JOHN D. T. McALLISTER, *Plaintiff in Error,*

vs.

BERTRAND KUHN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Motion to dismiss Writ of Error, and to affirm the Judgment of the Court below.

BRIEF FOR PLAINTIFF IN ERROR.

The application to vacate the judgment and set aside the default, and for leave to answer, was made at the term of the court in which judgment was entered.

A State Court is clearly distinguishable from a Territorial Court.

A Territory resembles a municipality; a State, in its sphere of action, is sovereign.

The one is supreme, the other dependent.

An appeal, or writ of error, from a Territorial Court to this Court, in a civil action, may be taken only when there is involved a money value to a defined amount.

Organic Law, Sec. 9.

Revised Statutes, Sec. 702.

A writ of error or appeal from a State Court to this Court, may be taken only when certain clearly defined principles or rights are involved or evoked.

Revised Statutes, Sec. 709.

The mode of procedure in the one is not the same as in the other.

The term *State Court*, in the rule referred to in this motion, cannot be held to include *Territorial Courts*, without doing violence to the rules of construction.

Clinton *vs.* Englebrecht, 13; Wall, 445.

By the Act of Congress approved April 7, 1874 (18 Revised Statutes, 27-28, chap. 80), it is provided that the appellate jurisdiction of the Supreme Court of the United States over judgments and decrees of said Territorial Courts in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal, according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed, or may hereafter prescribe.

When this case was removed to this Court, as the case below was triable, but not tried by a jury, owing to doubts of our own, both modes, were pursued (P. R. 15, 16, 17 and 18). But no question by this motion is raised as to the right to, or the form of bringing the case to this court.

Z. SNOW,

Counsel and Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1877.

[No. 155.]

JOHN D. T. McALLISTER, *Plaintiff in Error,*

vs.

BERTRAND KUHN, *Defendant in Error.*

ERROR TO THE SUPREME COURT OF THE UNITED STATES FOR THE TERRITORY OF UTAH.

STATEMENT of the CASE by the PLAINTIFF IN ERROR.

This action was commenced on the 9th day of September, 1873, in the District Court, of the Third Judicial District of the Territory of Utah, by the defendant in error, against the plaintiff in error.

The complaint duly verified alleges: That Bertrand Kuhn was, on the first day of September, 1873, since then has been, and is now, the owner and lawfully entitled to the possession of Two Hundred and Fifty shares of the unassessable, paid-up

capital stock of the "North Star Silver Mining Company, Limited," an incorporation incorporated under the laws of the Dominion of Canada, and were contained in as represented by *five certificates*, each certificate being for fifty shares of said capital stock, and each certificate being duly signed on the face thereof by the Secretary, Treasurer and President of said company.

That the said Two Hundred and Fifty shares of the capital stock of the said "The North Star Silver Mining Company, Limited," were, at the time above mentioned, and are now, worth, and of the value of, Twelve Thousand dollars. That on or about the first day of September, 1873, and while the plaintiff was the owner, and lawfully entitled to the possession of the aforesaid Two Hundred and Fifty shares of capital stock above described, the said defendant, at the city of Salt Lake, Territory of Utah, without the plaintiff's consent, and wrongfully, took the said Two Hundred and Fifty shares, described as aforesaid, and converted the same, unlawfully and wrongfully, to his use, to the damage of the plaintiff, in the sum of Twenty-five Thousand dollars.

That before the commencement of this action, to wit, on the 6th day of September, 1873 the plaintiff demanded of the defendant possession of the said Two Hundred and Fifty shares of capital stock, before mentioned and described, but that the defendant refused to return the same, and still remains in possession thereof, from the plaintiff.

Wherefore plaintiff demands judgment against defendant for the sum of Twenty-five Thousand dollars and his costs of action.

SMITH & TILFORD,

Attorneys for Plaintiff.

(P. R. 1.)

To this the following demurrer was filed—

TITLE.

And now comes the said Defendant, and demurs to said complaint, and for cause of demurrer assigns the following, to wit:

First—That said complaint does not state facts sufficient to constitute a cause of action.

Second—That said complaint is ambiguous and uncertain in this: That said complaint does not describe the said property alleged to have been taken and converted, so that the same can be identified. That it doth not appear, by said complaint, to whom said certificates of stock were issued, or to whom payable; whether they are owned by the payee therein, or his assignee: the numbers of said certificates are not given, nor is it stated that said five certificates were all the certificates ever issued; the value of each of said five certificates is not given; the terms and conditions of said certificates are not given in substance or in fact.

MARSHALL & ROYLE,

Attorneys for Defendant.

(P. R. 2.)

This demurrer was withdrawn by leave of Court, April 15, 1874, and leave to answer given.

No answer was filed, and the clerk of the Court on the 28th day of April, 1874, entered a default. (P. R. 4.)

Afterward the following judgment was entered:

JUDGMENT OF THE COURT.

TITLE.

In this action, the defendant having duly appeared and filed his demurrer herein, to the complaint herein, and the same having been by leave withdrawn in open Court, on the 15th day of April, 1874, with leave to defendant to answer within ten days thereafter; and the said defendant not having elected to answer, the time allowed by the Court for answering having expired, and the default of the said defendant having been duly entered according to law. Now, on this day, due proofs of the damage sustained by plaintiff having been made in open Court, on motion of Tilford & Hagan, attorneys for the plaintiff, it is ordered and adjudged that the plaintiff do have and recover from the said defendant the sum of Three

Thousand Three Hundred ($3,300) dollars, with interest thereon from date hereof, at the rate of ten per cent. per annum until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of Twelve dollars and Fifty cents.

Judgment rendered, Oct. 13, 1874.

The civil Practice Act of Utah, [C. L. 417, Sec. (1293) 68.] provides that the Court *may*, upon such terms as *may* be just, and upon payment of costs, relieve a party or his legal representatives from a *judgmeut, order or other proceeding taken against him through a mistake inadvertance, surprise or excusable neglect.* Pursuant to provisions of this act, McAllister sought to vacate this default and Judgment, and to obtain leave to defend the action. To accomplish this, he filed a motion and affidavit in the case, which motion was overruled by the Court. The reason assigned in this motion, was the default was suffered through a mistake of fact and an excusable neglect. (P. R. 5, 6, 7, 8, 9.)

The affidavits upon which the mistake of fact, the excusable neglect, and the defence to the action were based, were his own and Richard McAllister's. By these affidavits it appears (P. R. 6, 7, 8.) that Richard McAllister made oath, Oct. 22, 1874, and said, that John D. T. McAllister was acting Territorial Marshal of this Territory from an early part of the year 1872 to an early part the of year 1874, and that this affiant, during that time, was his deputy and acting as such deputy. That some time in the month of August, 1873, an execution came into his hands to be served, issued on a judgment of this Court entered in a case wherein one D. R. Firman, assignee of one Butterfield, a bankrupt, was plaintiff, and one Meyer Openheimer was defendant, on or about the 26th day of August, 1873, for between Seven and Eight Thousand dollars, which said judgment had been assigned to one Patrick Lannan. That, soon after said execution came into his hands to be served, he, at the request of the said D. R. Firman, went to the office of the said Firman, in Salt Lake City, the said Firman informing this affiant that there was, at said office, in the hands of one Thomas Almay, five certificates of fifty shares each of the capital stock of the *North Star Silver Mining Company, Limited*, which he, the said Firman, informed this affiant was the property of the said Meyer Openheimer; that when at said

office he, this affiant, saw the said Almay, and informed him of the existence of said execution, and concerning the information before mentioned, derived from the said Firman, and that he had come to levy on said certificate of capital stock, when he, said Almay, also informed this affiant that these certificates of stock were the property of the said Meyer Openhiemer, and that he held them subject to his order. Thereupon the said Almay produced to this affiant the said five certificates of said capital stock of said company, and this affiant levied upon them to satisfy said execution, so far as their sale might produce the money. He further says that Messrs. Marshall & Royle were the attorneys for the said Firman and Patrick Lannan, the judgment creditors of the said Openhiemer; that as soon as said levy had been made this affiant informed the said Marshall & Royle concerning it, which met their approval, as this affiant then thought and still thinks.

He further says that a short time after the levy and before the sale hereinafter mentioned, but the exact time this affiant is unable now to state, the said Bertrand Kuhn came to this affiant, and professed to be the owner of these certificates of stock, but did not make known to this affiant his title to them. The certificates appeared to have been issued to the said Meyer Openheimer, and the legal right to them appeared to be in him. This affiant then informed the said Marshall & Royle, the said Firman and the said Lannan, of the claim of the said Kuhn: they, the said Marshall & Royle, the said Firman, and the said Lannan, informed him that such claim was unfounded, and they would protect the marshal and defend him against that claim. Relying on this promise he, as such deputy marshal, acting under the counsel of the said Marshall & Royle, sold said shares of stock to the said Patrick Lannan, and delivered them to him, and Messrs. Marshall & Royle, as attorneys for Patrick Lannan, appeared in this case, and in the name of John D. T. McAllister, the defendant, filed a demurrer to the plaintiff's complaint, and continued to act in this case as such attorney until after the withdrawal of the demurrer, when Marshall & Royle sent a letter to him to the effect that they had withdrawn from this suit, and that the defendant must employ another attorney. On the receipt of this letter, he, this affiant, called on Mr. Lannan, the person beneficially interested, and informed him concerning this letter; when he, Patrick Lannan, informed this affiant, that he had paid Messrs. Marshall & Royle for their services, and they should not

withdraw, that he had something to say about that; "At all events," he said, "you go about your business, I will see that the case is attended to." Acting under this instruction he, this affiant, went about his business as usual, firmly believing that this case was receiving the attention which its merits required, nothing doubting but that it would either be settled by Patrick Lannan, or be otherwise attended to, and he knew nothing to the contrary until Mr. Snow, another attorney of this court, called on him and informed him that Messrs. Tilford & Hagan, the attorneys for the plaintiff, spoke to him about this case, told him its situation, and said they supposed Mr. Lannan had the stock, and if they would return the certificates they still would receive them. This information was given to this affiant only a few days ago, being subsequent to the rendition of the judgment.

He further says that, so soon as this information reached him, he called on the said Lannan for information concerning it, and for an explanation of his conduct, when he informed this affiant that the certificates of stock were in Canada for sale, and that the said John D. T. McAllister could have the shares of stock for Fifteen Hundred dollars, and not otherwise, and that he would not employ an attorney to defend this suit.

He further says that, though he does not personally know as there is a good defence to this suit, for the reason that he has no actual knowledge of the right or claim of the said Bertrand Kuhn to the said certificates of stock, but from the information of others he believes there is, at all events he believes the judgment is much to high.

He further says that the execution above referred to, though returned by this affiant, is not on the files, and this affiant does not know where it is. The return was written out for him by Mr. Royle; he is therefore unable to produce it.

In conclusion he says that the said John D. T. McAllister entrusted this entire matter to him, and knew nothing of the proceedings except as he learned it from this affiant.

That he makes this affidavit to be used on a motion for setting aside the judgment and default in this case, and for leave to file an answer and make a defense to this suit.

R. W. McALLISTER.

Subscribed and sworn to.

TITLE.

And that John D. T. McAllister made oath, October 22, 1874, and said that he, this affiant, is the defendant in this suit; and that he, this affiant, from an early part of the year 1872 to an early part of the year 1874, was the acting Territorial Marshal of this Territory, and that during that time Richard McAllister was his deputy; that he, this affiant, has no knowledge concerning the facts in this suit, except such as was derived from his said deputy; that he has read the affidavit of his deputy, Richard McAllister, made this day to be used on the motion in this case, and that, according to his recollections, the statements therein are in accordance with his communications to him at the time of their occurrence; that his understanding of the matter was that the case was to be conducted by counsel employed by Mr. Lannan, and he never knew anything to the contrary till Mr. Snow, a few days ago, communicated to him the condition of the case; that he never had any personal conversation on the subject with either Messrs. Marshal & Royle or Mr. Lannan. He further says, if the judgment in this case is permitted to stand he and his bail may have it to pay, and unless he can recover the amount from Mr. Firman and Mr. Lannan there will be a great loss to him for nothing but an error of judgment in serving, by his deputy, a lawful writ, in a manner which, at this time, was believed to be lawful. He further says that had he known of its situation he should most assuredly have attended to it at the proper time.

This motion being overruled, McAllister asked leave to renew the motion and filed the affidavits of himself, Richard McAllister and Z. Snow, all made December 3rd, 1874.

TITLE.

Richard McAllister being duly sworn says that the annexed letter was handed to deponent by said defendant, on the day of its date, or within a day or two afterwards; that on the same day he had the interview with P. H. Lannan, mentioned in deponent's affidavit made on the 22nd day of October, 1874, in addition to what was stated in that affidavit, said Lannan said he would return the stock in question rather than have the marshal suffer for making the sale. Deponent further says that, by

direction of said defendant, on the same day he received said letter and had said talk with said Lannan, he requested Z. Snow, Esq., to attend to this suit for said defendant. Deponent explained said case to him, Lannan's connection, showed him the annexed letter, and said Snow promised to do what was necessary for said defendant; that deponent reported to defendant at once the said conversation with Lannan and Snow.

LETTER.

SALT LAKE, April 15, 1874.

John D. T. McAllister:

Dear Sir—Owing to the position we have taken in the matter of the Utah Windsor M. Co. *vs.* R. T. Burton *et al*, and are compelled to take therein, we feel it impossible for us to fight your case of B. Kuhn *vs.* you, and have so notified Mr. P. Lannan. You have ten days from to-day to file your answer. We would advise you at once to see Mr. Lannan and have him retain new attorneys. We hereby notify you of our withdrawal from this cause, as we have notified Mr. Lannan, by whom we were engaged, and who consents thereto.

Yours,

MARSHALL & ROYLE.

TITLE.

Zerubbabel Snow being duly sworn says that he has read the affidavit made in this cause this day by said defendant and Richard McAllister: that deponent is convinced that said Richard conveyed to deponent defendant's request therein mentioned to appear for him to defend this suit, though deponent does not now recall the occasion and circumstance thereof; that deponent has conversed with said Richard on the subject; deponent by way of excuse for not putting in an answer says, that he either did not understand the request, or by reason of a press of other business and the infirmities of age, he failed to appear; deponent further says that the first notice he had of the judgment rendered in this action was received by deponent from the plaintiff's attorneys immediately before making the former affidavit for setting aside the default.

TITLE.

John D. T. McAllister, the above named defendant, being duly sworn, says that he has fully and fairly stated the case in this action to his counsel therein, J. G. Sutherland; that defendant has a good and substantive defence to the action of said plaintiff on the merits, as he is advised by his said counsel, after said statement made as aforesaid, and as deponent verily believes to be true; Defendant further says he received the letter from Marshall & Royle, annexed to the affidavit of Richard McAllister this day made in this cause. Defendant received said letter on the day of its date, or within a day or two afterwards; that deponent at once handed the same to Richard McAllister, with instruction to carry said letter to Judge Z. Snow, and request him to defend this suit for deponent. Defendant further says that he rested easy afterwards to the confident expectation that his said attorney, Snow, and Lannan, would take all necessary steps for deponent's defence. That deponent heard nothing to the contrary until informed of the rendition of the judgment a few days ago.

This last motion was also overruled and the case appealed to the Supreme Court of the Territory, in which court the judgment of the District Court was affirmed.

A writ of error brings the case to this Court.

ERRORS ASSIGNED.

Now comes John D. T. McAllister, above named, by Z. Snow and Sutherland & Bates, his attorneys, and says there is error in the record and proceedings in this case, in this, viz:

1.—Shares of stock in a foreign corporation being intangible and only representing a right of the owner to receive dividends of profit, if any, accruing during its existence, and a right to receive portions of the surplus, if any, at its dissolution, cannot, against the will of the owner, be wrongfully taken and converted to the use of another. Therefore, the averment in the complaint, that McAllister, on or about the 1st day of September, 1874, at Salt Lake City, in the Territory of Utah, against the will of the said Bertrand Kuhn, wrongfully took the shares of stock in the complaint mentioned, and converted them to his use, is an averment of an impossible thing, and asserts no issuable facts.

2.—The averment in the complaint that the Two Hundred and Fifty shares of stock of said foreign corporation is contained in and represented by five certificates signed as in said complaint alleged, is only a conclusion of law, and therefore does not tender an issue of fact.

3.—The foreign corporation mentioned in the complaint, being a subject of the Dominion of Canada, is to be governed and controlled by the laws of the Dominion, whatever those laws may be, and there is no averment in the complaint showing in what manner those shares can be transferred to the said McAllister, nor how he could obtain a right to them against the consent of the said Kuhn.

4.—A foreign corporation has only the locality of the sovereignty of its creation, which, in this case, is the Dominion of Canada, but its shares are attached to and cannot be separated from the person of the owner. They have no identity elsewhere. This identity is not corporeal; Therefore, the averment that McAllister took them against the will of Kuhn, and wrongfully converted them to his own use, is only an erroneous conclusion of law, not an averment of a fact.

5.—The court erred in assessing the damage without submitting that question to a jury.

6.—The court erred in not, pursuant to McAllister's motion, opening the judgment and setting aside the default, and in refusing to McAllister leave to defend the action.

7.—The Supreme Court of the Territory erred in affirming the judgment of the District Court.

For these and other manifest errors in the record and proceedings, the said John D. T. McAllister prays that the judgment of the Supreme Court of the Territory may be reversed.

Z. SNOW,

Attorney for McAllister.

ARGUMENT FOR PLAINTIFF IN ERROR.

In this argument we shall consider together the complaint, the demurrer and the assignment of errors 1, 2, 3 and 4.

The Civil Practice Act of Utah provides (C. L. p. 401), Sec. (1226) 1—That there shall be in this Territory but one form of civil action for the enforcement and protection of private rights, and the redress or prevention of private wrongs.

(Page 412.) Sec. (1263.) 38. The only pleadings on the part of the plaintiff, shall be the complaint or demurrer to the defendant's answer; and the only pleading, on the part of the defendant, shall be the demurrer or answer.

SEC. (1264.) 39. The complaint shall contain, among other things not necessary to be noticed, a statement of facts constituting the cause of action in ordinary and concise language.

SEC. (1265.) 40. The defendant may demur to the complaint when it appears on the face thereof (here follows seven causes, among which there are several which may or may not appear on the face of the complaint); among the causes of demurrer, are:

First.—That the court has no jurisdiction of the person of the defendant or the subject of the action.

Sixth—"That the complaint does not state facts sufficient to constitute a cause of action."

(P. 413.) SEC. (1209.) 44. "When any of the matters enumerated in section forty do not appear upon the face of the complaint, the objection may be taken by answer.

SEC. 45. "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, *excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.*

The provision, that, the complaint shall contain a statement of facts constituting a cause of action in ordinary and concise language, is in concise terms. But concise as these are, they include rules of pleading, applicable to every possible form of action, *law, equity, in rem, prohibition, injunction, mandamus, etc.*

With these provisions the plaintiff in each case must bring his action according to the nature of the relief demanded, and in his complaint state all the material facts constituting the cause of action. It is essentially an action in the case.

Field *vs.* Stone, 7 How, Pr. 12.
Clark *vs.* Harwood, 8 How, Pr. 470.
Minor *vs.* Terrey, 6 How, Pr. 208.
Getty *vs.* Hudson, 6 How, Pr. 269.
Green *vs.* Palmer, 15 Cal., 414.
Uhlfelder *vs.* Levy, 9 Cal., 615.
Jerome *vs.* Stebbins, 14 Cal., 459.
Stringer *vs.* Davis, 30 Cal., 320.

Failing to do this, the complaint is bad on demurrer.
Civil Practice Act, Sec. 40.
Jerome *vs.* Stebbins, 14 Cal., 458.
Allen *vs.* Patterson, 3 Seld. 478.

Such a defect is not waived by failing to demur; a judgment entered thereon will be reversed on appeal, though no objection was taken to it in the court below.
Benedict *vs.* Bray, 2 Cal., 256.
Russel *vs* Byron, 2 Cal., 86.
Civil Practice Act, Sec. 45.

Such a complaint is fatally defective; 39 Cal., 889.

The exception in section 45, above mentioned, that the complaint does not state facts sufficient to constitute a cause of action, harmonizes with the maxim of law, that the expression of one thing is the exclusion of another. Broom's legal maxims, 581 star paging. This defect is made by the act equal to a want of jurisdiction of the subject of the action. When this appears, it is the duty of the court to arrest the proceedings.
12 Pet., 657, 717.

There is a clear distinction between foreign and domestic corporations.

Each within its sovereignty can exercise the powers conferred by its charter or by law. Neither is migratory.

There is also a clear distinction between the *property* of the corporation and the *shares of stock*. The property of the corporation generally, not always, is tangible, and may be seized or taken possession of. The *shares of stock* belong to the shareholders, generally called stockholders. These are intangible. They can neither be seized nor taken possession of. The shares of stock represent an interest in the corporation. Each share represents a right. This right is to receive during the continuance of the corporation, a portion of dividends, and on its dissolution to receive a portion of the avails of the property. This is only a right. A right in action, a chose in action. This right has no locality, no situs; but, by a fiction of law, it is attached to the person who has the right, and is inseparable from him. When, therefore, there exists a foreign corporation, it is a citizen or subject of the foreign country by whose laws it exists. Its property may or may

not be there situate; the shares of stock may or may not be owned by the citizens or subjects of such foreign country; but whether they are or are not owned by such citizens or subjects, in their very nature the shares are only rights in action. This right cannot be taken from him against his will, except by virtue of some law, and if it be a law of the foreign country, that law should appear—the plaintiff should state it as a fact. If by a by-law of the corporation, that by-law ought to have been stated in the complaint as a fact.

There is no law in Utah which authorizes *shares of stock* in a foreign corporation, to be levied upon *or otherwise taken*, against the will of the shareholder.

A corporation for some purposes is a person, for others it is not a person.

In Utah, corporations, by their officers, may issue certificates of stock to the stockholders. How it is in the Dominion of Canada does not appear; but suppose we state the subject as if the two laws in that respect are the same.

Then we say the certificate of a share of stock issued by the officers of the corporation to the stockholder is not *the share*, but only *the evidence* of the ownership of it.

If the assignment of the certificate carried with it the *right* to the *share*, and consequently the right to a dividend of profits and of the surplus, on its dissolution, that ought to have been stated in the complaint as a fact; however, if that was the case it could not have been taken against the will of the shareholder.

The complaint in this case analyzed, is the same as to say that Kuhn had two hundred and fifty choses in action against a named person living in the Dominion of Canada, of the value, etc., which McAllister. against the will of Kuhn, wrongfully took and converted to his own use.

Such a statement is inconsistent with logic and with law. An impossibility cannot become possible by stating in a complaint its existence as a fact.

True, actions for shares of stock have been maintained and without doubt correctly; yet in these actions the special facts appear.

Anderson *vs.* Nichols, 28 N. Y., 600.
Atkins *vs.* Gamble, 42 Cal., 86.
Boylum *vs.* Huguel, 8 Nevada, 352.
Wilson *vs.* Little, 2 Comstock, 443.

For some purposes shares of stock, though merely choses in action, are considered as personal property with a situs given them; such is the case for taxable purposes. They may be pledged, but this must be done in writing, as no manual delivery can be given.

2 Comstock, 443.

Storey on Bailments, Sec. 297.

Ought not such facts, if they exist, to appear?

Neither trover nor replevin can be supported for a chose in action; as a share of stock.

1, Smith's Leading Cases, 486.

It is now sufficient—though once doubted—for the plaintiff, in stating his title to corporeal personal property, to state that he is the owner.

Dye *vs.* Dye 11, Cal., 166.

Greewell *vs.* Waldon, 23 Cal., 169.

But in stating his right or title to a chose in action such as an action on a promissory note, the plaintiff must state in his complaint the execution of the note by the defendant and its delivery to him; or if he be an endorsee, the delivery to the payee and the endorsement by the payee to him.

It is not enough in such case for him to state he is the owner of the note without showing how he became the owner.

Poorman *vs.* Mills, 35 Cal., 118.

Widderspoon *vs.* Rogers, 32 Cal., 569.

The plaintiff below, therefore, in stating his title to the shares of stock, only stated conclusions of law.

City of Buffalo *vs.* Holloway, 3 Seld, 493.

Parker *vs.* Taller, 10 How, 238.

Vansorf. Pl. 284.

As to our fifth assignment of error, we say, the right of trial by jury on issues of fact is a sacred right approximating to inalienable rights. Is it to frittered away by mere implications? How is it with the act of Utah? We submit that the assessment of *damages* in an action for a *tort* is an *issue* of fact.

(C. L. p. 444.)

SEC. (1381.) 159. Provides that an *issue* of *fact* shall be tried by a *jury, unless a jury trial is waived* or a reference be ordered, as provided in this act.

(C. L. p. 440.)

SEC. (1376.) 151. Provides that judgment may be had if the defendant fail to answer the complaint.

First.—In an action arising upon a *contract* for the receiving of money or damages only, *if no answer has been filed* by the clerk for the amount mentioned in the summons.

Second.—In other actions—which includes all torts—if no answer has been filed, the clerk shall enter the default, and thereafter the plaintiff may apply to the court for the relief demanded. If the taking of an account or the proof of any fact be necessary, etc., the court *may* take the account or hear the *proof*, or may, in its discretion, order a reference for that purpose.

And when the action is for the recovering of *damages* in *whole* or in *part*, the court *may* order the *damages* to be *assessed* by a *jury*. The word *may* in this clause, as we understand it, means shall.

The only act we have on the subject of the waiver of a jury trial is found

(C. L. 449,) Sec. (1404.) 179.

Trial by jury may be waived by the several parties to an issue of fact in actions arising in *contract*, and, with the assent of court, in other actions in the manner following:

First.—By failing to appear at the trial.

Second.—By written consent, in person, or by attorney, filed with the clerk.

Third.—By oral consent in open court, entered in the minutes.

In California, the State from which our act was mostly taken, they have an act nearly in the same words as in Utah, but they also have a constitution in which we find the following: "The right of trial by jury shall be secured to all and remain inviolate forever; but a jury trial may be waived by the parties in a civil action in the manner to be prescribed by law.

Con. Cal., Art. 1, Sec. 3. Harston's Practice, 276.

In that State this provision has been acted upon so long, that failing to appear at the trial, is a waiver of the jury trial.

But we are under the Constitution of the United States, Article VII, which does not contain the right of the Legislature to provide for implied waivers.

Our sixth assignment of errors relates to the refusal of the court below to vacate the default and judgment and permit McAllister to defend the action. To this we say, the word *may* in the civil practice act before quoted, section 68, *importing power and authority* includes within its meaning *must and shall creating a duty*, so that it sometimes means *may*, sometimes *must* and sometimes *shall*. When, therefore, a judgment, order or proceeding in the court is entered or taken through a mistake, accident, surprise, or excusable neglect and that judgment, order or proceeding is unjust, inequitable or erroneous in whole or in part. the party aggrieved has the right on a proper showing to be relieved; and it is error to withhold that relief. Such an application is addressed, not merely to the arbitrary discretion of the court, but to its legal discretion. To test our sixth assignment of error by this rule, we find McAllister, so soon as the knowledge of the judgment came to him, prepared and presented to the court two affidavits, stating the facts of a legal defence, and his excuse for not attending to it, the substance of which was, that one Openheimer was the owner of the shares of stock, not the defendant in error, and that McAllister, an officer of the court, to satisfy an execution in his hands against Openheimer, levied on the certificates, the evidence of the existing shares, not on the shares, and sold the certificates. That the attorneys for the judgment creditor and the judgment creditor undertook the defense, and then failed to do it.

(See P. R. p. p. 6, 7, 8.)

Baily *vs.* Taaffe, 29 Cal., from 422 to 427.

The application may be presented to the court by affidavit, showing the mistake, accident or excusable neglect, accompanied with an answer, showing,

First.—A defense, or,

Second.—A statement of the facts in a general way, and referring the question of a defense to the opinion of the court, or,

Third.—Stating the facts to counsel, and getting his legal opinion as to a defense, or,

Fourth.—The defendant's own affidavit of merit.

The first and second are to be preferred. We followed the second and third.

The answer to the complaint, the court will perceive, would have been, on the defendant's information and belief, a specific denial of each and every allegation in the complaint, and on his knowledge set up his official character, the judgment, execution, levy and sale of the certificate, and averred the property to have been Openheimer.

We respectfully submit that this is something, more than a mere discretion of a court; it is a legal discretion, and in this case it was error to withhold it.

Z. SNOW,

Counsel and Attorney for Plaintiff in Error.